

Office of Chief Counsel
Internal Revenue Service
memorandum

CC:NER:NED:BOS:TL-N-3081-99
BJLaterman

date:

to: District Director, New England District
Attn: E:PPQMB:Daronson

from: District Counsel, New England District, Boston

subject: Request for Technical Advice: Restricted Consent
Taxpayer: [REDACTED]
EIN: [REDACTED]
Taxable Year: [REDACTED]
Statute of Limitations Expires: [REDACTED]

This is in response to your request for advice regarding the solicitation of restricted consents from the above-mentioned taxpayer for the taxable year ended December 31, [REDACTED].

[REDACTED] ([REDACTED]) is in the mutual fund distribution business. You are in the process of examining the taxpayer's [REDACTED], [REDACTED] and [REDACTED] taxable years. In a previous memo we have given advice regarding 1) the language to be used on a restricted consent to extend the statute of limitations for the taxable period of [REDACTED] ending [REDACTED]; and 2) who should execute the restricted consent. You now request similar advice for the [REDACTED] taxable year.

On [REDACTED], [REDACTED], the sole shareholder of [REDACTED], transferred all of his [REDACTED] stock to [REDACTED] ([REDACTED]). [REDACTED] owned all of the stock of [REDACTED] before and after the transfer. On [REDACTED], [REDACTED] signed a Form 872 (Consent to Extend the Time to Assess Tax) to extend the statute of limitations for [REDACTED] tax year to [REDACTED]. We assume that you obtained a restricted consent for [REDACTED] based upon the advice contained in our previous memo. The taxpayer has indicated it will only sign a restricted consent to extend the statute for [REDACTED].

Four matters are in issue in this case: 1) whether the taxpayer's expenses incurred to establish itself in Poland ("Polish expenses") are deductible in the year incurred, or only in a subsequent year; 2) whether travel expenses attributable to a spouse accompanying a corporate officer on travel, should be

disallowed as personal expenses; 3) whether the taxpayer properly accounted for 12b-1 fee income; and (4) the proper tax treatment of mutual fund start-up costs.

The District Director is authorized to execute restricted consents in limited circumstances, including the need to establish an interpretive position through court decision, regulation, ruling or other National Office action, or where other equally meritorious circumstances exist. Rev. Proc. 68-31, 1968-2 C.B. 917, modified by Rev. Proc. 77-6, 1977-1 C.B. 539. Restricted consents are appropriate for cases placed in suspense, cases held in abeyance waiting completion of Examination or Appeals action in a related case or in another tax year of the same taxpayer; and other cases where delay in concluding audit action is attributable to the Service, or is attributable to other factors beyond the taxpayer's control.

IRM 4541.71(1) indicates that an agent should ask the taxpayer to sign an "open-ended" restricted consent on Form 872-A, but if the taxpayer prefers, the Service will accept a restricted Form 872 instead.

As a general rule, a restricted consent should not be used if more than two issues must be held open. Difficulties in clearly and accurately describing the scope of the consent should be taken into account in determining whether a restricted consent should be used. IRM 4541.71(2). Under I.R.C. § 6501(c)(4)(B), which was added by the IRS Restructuring and Reform Act of 1998, the Service is required to notify taxpayers of the right to refuse to extend the statute of limitations, or to limit the extension to particular issues or to a particular period of time. Although this provision applies only to requests to extend made after December 31, 1999, it would be advisable to act in accordance with it now, and agree to a restricted consent for [REDACTED] even though more than two issues must be held open.

The Internal Revenue Manual contains guidance on the wording of restricted consents. All restrictive consents must contain the following basic restrictive language: "The amount of any adjustment to **(description of the area(s) of consideration)** including any consequential changes to other items based on such adjustment." IRM 4541.72(1). The description should describe the area of consideration, ie., the transaction or item, rather than the proposed tax treatment. The description should not be so precise that it forecloses the use of alternative rationales, and should not include Internal Revenue Code sections.
IRM 4541.72

Where the resolution of the unresolved issue will have an automatic effect on other items, the following phrase may be added to the restrictive statement to cover automatic adjustments: "and includes any amount resulting from statutory computation or recomputations based on such adjustment." IRM 8233(12) (3).

To ensure that a consent is restricted for both deficiency and refund purposes, the following statement should be inserted after the restrictive statement: "The provisions of section 6511(c) of the Internal Revenue Code are limited to any refund or credit resulting from adjustment for which the period for assessment is extended under this agreement." IRM 8233(12) (4).

We recommend that you use the following language:

"The amount of any deficiency assessment is to be limited to that resulting from any adjustment to the accounting or tax treatment of items of expense or income: (1) relating to business in Poland, including marketing, legal, consulting, and travel and entertainment expenses; (2) relating to 12b-1 commissions; and (3) relating to mutual fund start-ups, including any consequential changes to other items such as carryovers or credits, based on each of the above adjustments, and any amount resulting from statutory computation or recomputations based on such adjustments. The provisions of I.R.C. § 6511(c) are limited to any refund or credit resulting from adjustment for which the period for assessment is extended under this agreement."

The authority to execute restricted consents on behalf of the Service has been delegated to District Directors, and redelegated to their subordinates of Grade GS-11 and higher, including Reviewers GS-11, Group Managers; Case Managers; and Returns Programs Managers. Delegation Order No. 42 (Rev. 13), 1980-1 C.B. 571; Bridges v. Commissioner, T.C. Memo. 1983-763.

The regulations under I.R.C. § 6501(c)(4) do not specify who may sign consents. Accordingly, the Service will apply the rules applicable to the execution of the original returns to the execution of consents to extend the time to make an assessment. Rev. Rul. 83-41, 1983-1 C.B. 399, clarified and amplified, Rev. Rul. 84-165, 1984-2 C.B. 305.

In the case of corporate returns, I.R.C. § 6062 provides that a corporation's income tax returns must be signed by the president, vice-president, treasurer, assistant treasurer, chief accounting officer or any other officer duly authorized to act.

The fact that an individual's name is signed on the return is prima facie evidence that the individual is authorized to sign the return. I.R.C. § 6064. Accordingly, any such officer may sign a consent, whether or not that a person was the same individual who signed the return. Rev. Rul. 84-165. Therefore, if [REDACTED] is still an officer of [REDACTED] he may sign the Form 872 on behalf of [REDACTED].

If we can be of any further assistance, please feel free to call the undersigned at 617-565-7838.

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Special Litigation Assistant